11-926

1879

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 131.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

G. L. KIMBALL, ADMINISTRATOR OF ROBERT W. WISHARD, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED APRIL 10, 1879.

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INDEX.

	Original.	Print.
Writ of error	1	1
Return	1½	1
Declaration	2	2
Answer of Cunningham	4	4
Answer of Wishard et al	4	4
Jury	5	4
Suggestion of death of Wishard and motion to revive	5	4
Jury	6	5
First bill of exceptions	6	5
Verdict	16	16
Judgment	16	16
Second bill of exceptions	17	17
Citation	20	19
Clerk's certificate	21	19

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the eastern district of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between the United States, plaintiff, and G. L. Kimball, administrator of Robert W. Wishard, deceased, et el., defendants, a manifest error hath happened, to the great damage of the said plaintiff, as is said, and as appears by her complaint, we being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be then & there had and done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 14th day of December, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the hundred & first.

[SEAL.] RALPH L. GOODRICH,
Clerk of the Circuit Court of the United States of America for the Eastern District of Arkansas.

Allowed by—

HENRY C. CALDWELL,
U. S. Judge for East. Dist. Ark.

1½ Service acknowledged Dec. 22, 1876.

U. M. ROSE,
For Defendants in Error.

The execution of the foregoing writ of error appears by the schedule hereto annexed.
Febr'y 12, 1877.

RALPH L. GOODRICH, *Clerk.*

Filed Dec. 22, '76.

RALPH L. GOODRICH, *Clerk.*

2 Be it remembered that on the fifteenth day of June, A. D. 1874, came into the office of the clerk of the circuit court of the United States for the eastern district of Arkansas, the United States, by S. R. Harrington, esq., district attorney, and filed therein a complaint at law against Robert W. Wishard et al., which is in the words and figures following, to wit:

October term, 1874.

THE UNITED STATES
v.
ROBERT W. WISHARD, HENY B. HENDRICKS, Joseph Evins, Robert Cunningham, Henry P. Barry, & James M. Blackwell.

The said United States, plaintiff, complains of the said Robert W. Wishard, Henry B. Hendricks, Joseph Evins, Robert Cunningham, Henry P. Barry, and James M. Blackwell, defendants, for that the said defendants on the eighteenth day of June, in the year one thousand eight hundred and sixty-nine, at the eastern district aforesaid, by their certain writing obligatory, sealed with their seals and now shown to the court here, acknowledged themselves held and firmly bound, jointly and severally, to the said plaintiff, in the sum of fifty thousand dollars, and which said writing obligatory was and is subject to a condition thereunder written, and which condition is in the words following, that is to say: "That whereas the President of the United States hath, pursuant to law, appointed the said Robert W. Wishard collector of internal revenue for the third district of Arkansas, under an act entitled 'An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes,' and in due form of law caused to be issued to him as such a commission, bearing date the twenty fourth day of April, anno Domini one thousand eight hundred and sixty-nine: Now, therefore, if the said Robert W. Wishard shall truly and faithfully execute and discharge all the duties of the said office according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of the Treasury, all public moneys which may come into his hands or possession, and if each and every deputy collector appointed by said collector shall truly and faithfully execute and discharge all the duties of such deputy collector, according to law, then the above obligation to be void and of no effect; otherwise it shall abide and remain in full force and virtue."

Nevertheless, the said plaintiff in fact says that after making the said writing obligatory, to wit, on the thirty-first day of July, A. D. 1871, the said Robert W. Wishard, as such collector as aforesaid, held and owed to the said plaintiff a balance of money amounting to the sum of twenty-one thousand eight hundred and forty-six dollars and forty cents ($21,846.40), and belonging to the said plaintiff, for stamps and other property transmitted to him by the said plaintiff through the proper department and officers of the Government of the said United States, and for public moneys received by him and collected as aforesaid, and which sum the said Robert W. Wishard then and there neglected, refused, and failed to pay over to the said plaintiff (although often requested), or any part thereof, but so to do hath hitherto wholly refused and still doth refuse, to the damage of said plaintiff of twenty-one thousand eight hundred and forty-six dollars and forty cents, with interest thereon
3 from the 31st day of July, A. D. 1871, at six per cent. per annum, and therefore the said plaintiff brings her suit and prays judgment for her debt and for other relief.

S. R. HARRINGTON,
U. S. Atty. East. Dist. Arks.

And on August 22, 1874, the said district attorney filed an amended complaint, which is in the words and figures following, to wit:

The said United States, plaintiff, complains of the said Robert W. Wishard, Mercator Jessup, administrator of Henry B. Hendrix, deceased; Joseph Evins, Henry C. Cunningham, administrator of Robert Cunningham, deceased; Henry P. Barry and James M. Blackwell, defendants, for that the said Robert W. Wishard, Henry B. Hendrix, Joseph Evins, Robert Cunningham, Henry P. Barry, and James M. Blackwell on the eighteenth day of June, in the year of our Lord one thousand eight hundred and sixty-nine, at the eastern district aforesaid, by their certain writing obligatory, sealed with their seals and now shown to the court here, acknowledged themselves held and firmly bound, jointly and severally, their joint and several heirs, executors, and administrators, to the said plaintiff in the sum of fifty thousand dollars, and which said writing obligatory was and is subject to a condition thereunder written, and which condition is in words following, that is to say: "That whereas the President of the United States hath pursuant to law appointed the said Robert W. Wishard collector of internal revenue for the third district of Arkansas, under an act entitled 'An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes,' and in due form of law caused to be issued to him as such a commission, bearing date the twenty-fourth day of April, anno Domini one thousand eight hundred and sixty-nine: Now, therefore, if the said Robert W. Wishard shall truly and faithfully execute and discharge all the duties of the said office according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of the Treasury, all public moneys which may come into his hands or possession, and if each and every deputy collector appointed by said collector shall truly and faithfully execute and discharge all the duties of such deputy collector according to law, then the above obligation to be void and of no effect; otherwise it shall abide and remain in full force and virtue."

Nevertheless, the said plaintiff in fact says that after making the said writing obligatory, to wit, on the thirty-first day of July, A. D. 1871, the said Robert W. Wishard, as such collector as aforesaid, held and owed to the said plaintiff a balance of money amounting to the sum of twenty-one thousand eight hundred and forty-six dollars and forty cents ($21,846.40), and belonging to the said plaintiff, for stamps and other property transmitted to him by the said plaintiff through the proper department and officers of the Government of the said United States, and for public moneys received by him and collected as aforesaid, and which sum the said Robert W. Wishard then and there neglected, refused, and failed to pay over to the said plaintiff, although often requested, or any part thereof, but so to do hath hitherto wholly refused and still doth refuse, to the damage of said plaintiff of twenty-one thousand eight hundred and forty-six dollars and forty cents, with interest thereon from the 31st day of July, A. D. 1871, at six per cent. per annum, and

4 therefore the said plaintiff brings her suit and prays judgment for her debt and for other relief.

S. R. HARRINGTON,
U. S. Attorney, East. Dist. Ark.

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 26th day of October, A. D. 1874, at the United States

court-room in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on October 28, 1874:

Comes the defendants, by Rose and Green, their attorneys, and file herein their motion to require the plaintiff to file the bond sued on; and also file the separate answer of George S. Cunningham, and the answer of defendants Wishard, Jessup, as administrator of the estate of Henry B. Hendrix, Evins, Barry, and Blackwell.

Which answer of Cunningham is as follows:

And the said Henry Cunningham, defendant herein, comes, and for answer to said complaint says that he is not now, and was not at the time of the commencement of this suit, administrator of the estate of said Robert Cunningham, deceased.

ROSE & GREEN, BOLLES.

I, George S. Cunningham, agent of the above-named Henry Cunningham, say that he is now absent from the county of Pulaski, and that I believe the statements made in the foregoing answer to be true.

GEORGE S. CUNNINGHAM.

Subscribed and sworn to before me this 28th day of October, 1874.

RALPH L. GOODRICH, *Clerk.*

Which answer of Wishard et al. is as follows:

And the said defendants, Wishard, Jessup as administrator of the estate of Henry B. Hendrix, Joseph Evans, Barry, and Blackwell, come, and for answer to said complaint say that the said defendants do not owe to said plaintiff said sum of $21,846.40, or any part thereof, and did not at the time of the commencement of this suit.

2. That the said defendant Wishard hath fully kept all the conditions of said bond, and hath paid over to said plaintiff all moneys, and hath delivered to said plaintiff all proper y which came to his hands as collector as aforesaid.

BOLLES,
ROSE AND GREEN.

I, Robert W. Wishard, say that I believe the statements made in the foregoing answer to be true.

ROBERT W. WISHARD.

Subscribed and sworn to before me this 28th October, 1874.

RALPH L. GOODRICH, *Clerk.*

And on November 5, 1874, as follows:

Come the defendants, by Rose & Greer, their attorneys, and on their motion it is ordered that this cause be continued.

5 Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 12th day of April, A. D. 1875, at the United States court-room, in the city of Little Rock, Arkansas, the honorable John F. Dillon, circuit judge for the eighth judicial circuit, presiding, and honorable Henry C. Caldwell, district judge, holding said court, the following proceedings were had, to wit, on April 14th, 1875:

Comes the United States, by S. R. Harrington, esq., district attorney, and comes the defendant, by U. M. Rose, esq., his attorney, and both

parties announcing themselves ready for trial, a jury came, to wit, J. B. Howell, jr., James Gordon, D. L. Gray, W. A. Rector, L. S. Dunscomb, J. M. McClintock, S. C. Stowell, Hugh Bradley, Wm. B. Gibson, Griffin Cox, Wm. P. Burks, and James Higgins, being twelve good and lawful men of the district, who were duly tried, empannelled, and sworn well and truly to try the issues joined in this cause between the United States, the plaintiff, and Robert W. Wishard et al., the defendants, and a true verdict give according to the law and the evidence; and thereupon the court and jury proceeded to the hearing of this cause; and, pending the hearing, it appearing to the court that the rights of the parties on the defendant's (Wishard's) claim for allowance of the taxes turned over to his successor, H. A. Fick, cannot be investigated and determined until the department at Washington, or the proper officer, shall act upon the said claim and specify distinctly opposite each name on said list what part of the said claim is rejected because of the negligence of the said defendant Wishard to collect the same, and what part is rejected because said taxes were paid to the said defendant or his deputies before the expiration of his term of office; said Wishard to apply for without delay and present said list of taxes, or a copy of said list, turned over to his successor, to the Commissioner of Internal Revenue, for his action thereon and on the several items thereof the manner above specified, and that said application may be made by the defendant to the department, and that the action of the department, or proper officer, may be had thereon in the manner above specified, this cause is continued.

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 27th day of October, A. D. 1875, at the United States court-room, in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on November 1st, 1875:

Comes the defendants, by U. M. Rose, esq., their attorney, and suggests to the court the death of the defendant, Robert W. Wishard, and moves the court to revive this cause in the name of G. L. Kimball, the administrator of said Wishard; and comes the said G. L. Kimball, by U. M. Rose, esq., and enters herein his appearance; and comes the United States, by S. R. Harrington, esq., district attorney, and by consent this cause is continued.

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 23 day of October, A. D. 1876, at the United States court-room, in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on November 3, 1876:

6 UNITED STATES
v.
G. L. KIMBALL, ADMINISTRATOR OF ROBERT W. Wishard; Mercator Jessup, administrator of Henry B. Hendrix; Henry C. Cunningham, administrator of Robert Cunningham; Joseph Evins, Henry P. Barry, and James M. Blackwill.

Comes the United States, by Charles C. Waters, esq., district attorney, and come the defendants, by U. M. Rose, esq., their attorney, and

both parties announcing themselves ready for trial, a jury came, to wit, J. A. B. Bingham, W. H. Blackwell, W. C. Knight, W. D. Leiper, A. D. Meeks, Wiley B. Stuart, Wm. Sandlin, Albert P. Boon, J. J. Gillis, Ernest Jennings, John Kirkwood, and Wm. P. Davison, being twelve good and lawful men of the district, who were duly tried, empannelled, and sworn well and truly to try the issues joined between the United States and the defendants, and a true verdict give according to the law and the evidence, and thereupon the jury proceed to hear the evidence as well on the part of the United States as of the defendants, and the trial hereof not being concluded. the same is continued until to-morrow morning; and comes the United States, by Charles C. Waters, esq., district attorney, and files herein her first bill of exceptions to the rulings of the court, which is signed by the court.

Which bill of exceptions is in the words and figures as follows:

Be it remembered, that on the trial of this cause on this day, the defendants, for the purpose of laying a foundation for the introduction of evidence to support his claim for credits, introduced and read to the court a correspondence, admitted to be genuine, had by said Wishard and his attorneys with the Commissioner and Deputy Commissioner of Internal Revenue at Washington, D. C., which said correspondence was in the words and figures following, to wit:

DARDANELLE, ARKANSAS, *June* 1, 1874.

SIR: Yours, of April 30th, enclosing supplemental report, No. 8916, is now before me. I am at a loss to understand how you have made my aggregate liability to the Government as late coll. int. rev. of 3rd dist., Ark., amount to the sum of $31,184.85, unless you have charged me with the June list of 1871. This list, I am under the impression, I never received nor receipted for, and, therefore, should not be charged with it. The report is further incorrect in this, that it does not allow me credit for the list of outstanding taxes turned over to and receipted for by my successor in office, H. M. Fick, as required by law, said receipt being dated July 31, 1871, and for the sum of $18,318.34, and list of taxes then claimed uncollectable and for which an abatement was then claimed, $559.61; total, $18,877.95. I now have in my possession one of the receipts given by Coll. Fick for the above lists, the other having been forwarded with my accounts. Before allowing this matter to go to suit, I have to request that I be allowed the credits above claimed; and, if not allowed, I have to solicit the favor of a copy of the reports on file in your office, upon which account No. 8916 is based. And I also desire to be advised whether or not I stand charged with the June list, 1871; but that will appear in the reports if copy is sent. Please advise me fully before any further steps are taken in this matter.

7 Very respectfully, your ob't serv't,

(Signed) R. W. WISHARD,
By THOMAS BOLES, *Att'y.*

This is Exhibit E to the deposition of U. M. Rose.

FAY HEMPSTEAD,
Commissioner.

DARDANELLE, ARKANSAS, *July 10th*, 1874.

SIR: Your favor of 1st inst., enclosing summary statement of the account of late Coll. Wishard, is now before me. This being the first notice Mr. Wishard has had of the ruling of the honorable Commissioner

of Internal Revenue refusing credit in the settlement of his accounts the amount of the uncollected taxes embraced in the lists turned over by him to his successor in office, H. W. Fick, and receipted for by him, Fick, as such collector, on the 31st day of July, 1871, for the sum of $18,877.95, under the provisions of section 34, act of Congress approved Feb. 15th, and receipted for by said Collector Fick. This ruling Mr. Wishard deems unjust, and therefore respectfully excepts to the ruling of the hon. Com'r, and prays an appeal to the hon. Secretary of the Treasury. The action of the hon. Com'r in disregarding a receipt of Mr. Wishard's successor and charging that amount to him to the relief of Mr. Fick upon the ex parte showing of Mr. Fick is certainly a little extraordinary; especially is this the case when it is remembered Mr. Wishard had no notice of this action of the department until long after this unfair adjustment was made. I have to respectfully request a copy of the report made by Coll. Fick to your office by which he satisfies your office on an ex parte showing that he, Fick, has not collected the $11,318.20 which the same report satisfies your office that Coll. Wishard or his deputies had collected prior to the transfer of said uncollected lists by Wishard to Fick. The report we hope will show the names of the parties whom Mr. Fick claims have paid their taxes to Mr. Wishard prior to the lists being turned over to Mr. Fick, together with their post-office address and the respective amounts paid by each of them. I further desire a copy of the showing presented to department by Mr. Fick by which Mr. Wishard is charged with $451.44 on the June and July lists. Mr. Wishard insists that his stamp accounts were fully and finally closed out and settled up some time ago, and that he is able to show that; a fact well known to Hon. Arthur Gunther, special supervisor int. rev., and Gen. John A. McDonald, supervisor, &c., both St. Louis, Mo. Also Hon. Wm. A. Britton, late U. S. marshal western district Arkansas, F't Smith, Arkansas. An early reply is earnestly solicited.

Very respectfully, your ob't servant,

(Signed) THOMAS BOLES.

Hon. J. W. DOUGLASS,
Com. Int. Rev.

STATE OF ARKANSAS,
County of Yell:

I, Thomas Boles, do solemnly swear that the above and foregoing letters (the date of the law referred to not being legible) are true and perfect copies of letters sent by me to hon. Com'r Int. Rev. on the subject therein treated of; that I have once since written the department for a statement of the names of the persons which Coll. Fick reported as having paid their taxes to Mr. Wishard before the transfer of the lists mentioned to Mr. Fick, but have no reply from the department.

S THOMAS BOLES.

Sworn to and subscribed before me this 28th day of October, 1874.

GEORGE B. GUEST, *J. P.*

This is Exhibit F to the deposition of U. M. Rose.

FAY HEMPSTEAD,
Commissioner.

E. T.—H. C. R.

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, July 1, 1874.

SIR: Your letters of the 1st & 19th ult. relative to the balance due to

the U. S. from late Collector R. W. Wishard, 3rd dist. Ark., were duly received, but prompt reply prevented by the pressure of business. I enclose herewith a summary statement of the account of late Collector Wishard, as appears upon the books of this office, showing an aggregate balance due from him to the U. S. of $17,551.77. The balance due to the U. S. as shown in the last adjustment of his account by the accounting officer of the department No. 8916 is $21,846.40. The difference between these two amounts consists of certain items of credit not yet allowed by the accounting officers, but which will be considered in the final adjustment. Mr. Wishard did not receive credit for the amount of taxes reported by him as uncollected at the close of his term of office for the reason that this office had reason to believe that portions of these taxes had in fact been collected by Mr. Wishard or his deputies prior to their transfer to his successor, Collector Fick. The amount reported by Mr. Wishard as uncollected at close of his term is $18,877.95. This is accounted for as follows:

Amount collected by Coll. Fick to May 31st	$1,702 11
Amount abated by orders No. 6167 & 7165	5,059 06
Amount paid to Mr. Wishard or his deputies prior to the transfer, as reported to this office by Coll. Fick	11,318 20
Balance to be accounted for	798 58
Total	18,877 95

The statement herewith shows that Mr. Wishard is charged with the lists receipted for by him only, the latest being the list for May, 1871, The June list was receipted for by Collector Fick. Mr. Wishard is, however, charged with the taxes collected by him in the June and July, 1871 lists, as reported by Coll. Fick, amounting to $451.42.

Respectfully,

J. W. DOUGLASS,
Commissioner.

THOMAS BOLES, Esq.,
Att'y, &c., Dardanelle, Ark.

S. H. G.

This is Exhibit G to the deposition of U. M. Rose.

FAY HEMPSTEAD,
Commissioner.

DARDANELLE, ARK., *Feb'y* 9, 1875.

SIR: Suit having been instituted against me and my sureties in the United States circuit court for the eastern district of Arkansas for moneys alleged to be due from me as late collector of internal revenue of the third district of Arkansas, I now enclose to you a copy of my receipt from H. W. Fick, my successor in office, which I maintain to be a credit for the sums and property therein mentioned against the demands made in the said suit, and I now submit the same to you for ex-
9 amination and approval or disallowance, with a view to introducing the same in evidence on the trial of said cause.

Your early attention and reply will oblige,

Yours, truly,

R. W. WISHARD,
Late Coll. 3rd Dist., Ark.

TREASURER OF THE UNITED STATES,
Washington, D. C.:

This is Exhibit C to the deposition of U. M. Rose.

FAY HEMPSTEAD,
Commissioner.

(Indorsed:)

The original of which this is a true copy, together with the receipt, was mailed by R. W. Wishard to the Treasurer of the U. S., Washington, D. C., in my presence, on the 9th day of Feb'y, 1875, in the post-office at Dardanelle, Arkansas, at half past one o'clock p. m. of said day.

JNO. C. AUSTIN.

E. T.—H. C. R.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Feb. 22, 1875.

SIR: Referring to your letter of the 9 inst., relative to credit claimed to be due you on account of taxes transferred as uncollected to your successor in office, you are advised that the condition of your office and lists at the expiration of your term of office was such that this office did not feel warranted in certifying that you had exercised due diligence to collect the taxes transferred as above stated. This course has been fully justified by the result of the examination of the taxes in question, as it has been ascertained that $11,318.20 of the said taxes were collected by you or your deputies prior to the expiration of your term of office. Collector Fick can, if called upon, substantiate the statement made herein. As respects the blank forms, stationery, &c., alleged to have been transferred to Collector Fick, you are advised that the balance due from you does not include any amounts on account of stationery, blank books, &c., so that you have not been prejudiced in any way because of the same.

Respectfully,

J. W. DOUGLASS.
Commissioner.

R. W. WISHARD, Esq.,
Late Coll. 3 Dist., Dardanelle, Arkansas.

This is Exhibit D to the deposition of U. M. Rose.

FAY HEMPSTEAD,
Commissioner.

(Copy.)

LITTLE ROCK, *Sept. 27th*, 1875.

DEAR SIR: Enclosed I send you a list of taxes uncollected by Robert W. Wishard, deceased, late collector of internal revenue, and which list was turned over by him at the end of his term of office to H. W. Fick, his successor, for which credit is claimed on the suit brought against said Wishard and his sureties, and now pending in the U. S. circuit court for the eastern district of Arkansas, and which is now here submitted for allowance or disallowance. You will please return the same to my attorney, U. M. Rose, esq., at Little Rock, Arkansas, after having specified distinctly opposite each name on said list what part of said claim is rejected because of the negligence of said Wishard

to collect the same, and what part of said taxes was paid to said Wishard or his deputies before the expiration of his term of office.

Very respectfully,

(Signed) G. W. KIMBALL,
Executor, &c.,
By U. M. ROSE, *Att'y.*

COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

This is Exhibit H to the deposition of U. M. Rose.
FAY HEMPSTEAD,
Commissioner.

E. T.

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, Oct. 6, 1875.

SIR: Referring to your letter of the 27th ult., relative to the taxes transferred by the late R. W. Wishard, late coll. 3rd dist. Arkansas, to his successor, you are advised that the list referred to as enclosed in your letter has not been received. It will be returned to you, however, when received. The refusal of this office to make the certificate of diligence necessary to ensure the charging of the taxes referred to by you to the successor of late Coll. Wishard was general rather than special in its nature. The fact that a large part of the amount covered by the transfer list was collected prior to the date of transfer is established by receipts and other evidence on file in the office of the collector of internal revenue. The United States Attorney is in possession of the facts in the case and you are referred to him for any further information you desire on the subject.

Respectfully,

H. C. ROGERS,
Deputy Commissioner.

U. M. ROSE, Esq.,
Little Rock, Arkansas.

This is Exhibit J to the deposition of U. M. Rose.
FAY HEMPSTEAD,
Commissioner.

(Copy.)

LITTLE ROCK, *October 11th*, 1875.

DEAR SIR: Yours of the 6th, "E. T.", received, in which you say "you are advised that the list referred to as enclosed in your letter has not been received." I think that there has been some oversight in your office on this subject, for the letter and the list were made up into a long roll of very considerable size, and were securely enclosed in a substantial wrapper and put in the mail, so that the letter and the list must have been received at the same time.

Very respectfully,

U. M. ROSE.

COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

This is Exhibit K to the deposition of U. M. Rose.
FAY HEMPSTEAD,
Commissioner.

11 E. T.

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, Oct. 20, 1875.

SIR: Referring to your letter of the 11th inst., relative to a list of taxes alleged to have been transferred by R. W. Wishard, late coll. 3rd dist. Arkansas, to his successor in office, you are hereby advised that the list in question has been found, and will be sent by the mail of to-day to you, at Little Rock.

Respectfully,

H. C. ROGERS,
Deputy Commissioner.

U. M. ROSE, Esq.,
Little Rock, Arkansas.

This is Exhibit L to the deposition of U. M. Rose.

FAY HEMPSTEAD,
Commissioner.

For the same purpose the defendants read to the court the deposition of a witness, U. M. ROSE, in words and figures as follows, to wit:

I am attorney for the defendants in this suit. This case was formerly submitted to a jury, and after the evidence was heard the court, on its own motion, discharged the jury and continued the cause, in order that the United States Government might make its demands more definite. On that trial the defendant, R. W. Wishard, was examined as a witness on the part of the defense, and was cross-examined by the district attorney. He stated on the trial, on his examination, that on the 9th day of February, A. D. 1875, he mailed to the Treasurer of the United States, at Dardanelle, Ark., a letter, of which he referred to Exhibit C, hereto annexed, as a true copy; and that he received in due course of mail a letter, signed by the Commissioner of Internal Revenue, dated Feb. 22nd, 1875, hereto annexed, marked Exhibit D. He stated also that he enclosed in his letter of Feb. 9th a copy of the receipt given by Fick, as internal revenue collector, and which is referred to in the deposition of W. H. Feltus, above given. (See said receipt on page 12.) He also testified to the mailing of a letter dated June 1st, 1874, and another dated July 10th, 1874, hereto annexed, marked Exhibits E and F, and also to the receipt of a letter from the Commissioner dated July 1st, 1874, hereto annexed and marked Exhibit G. In the same testimony Mr. Wishard stated that he had used the utmost diligence in collecting such taxes as were turned over on the list to Fick, and that the taxes mentioned in said list were wholly unpaid. Said Wishard has since died. On the 27th day of September, 1875, I mailed to the Commissioner of Internal Revenue a letter, hereto annexed and marked Exhibit H, enclosing with the letter the list of delinquent taxes mentioned in the testimony of William P. Field herein. In reply I received a letter from the Commissioner or his deputy, dated Oct. 6th, 1875, saying that the letter had been received, but not the list. I hereto attach his letter, marked Exhibit J. This letter was received in due course of mail. I at once wrote him—Oct. 11th, 1875—saying that the list was enclosed with the letter, and that they must have both been received by him at the same time, a copy of which letter is hereto annexed, marked Exhibit K, and made a part hereof. In reply to this I received by due course of

12 mail a letter from the Deputy Commissioner, dated October 20th, 1875, which is hereto annexed and marked Exhibit L. With this letter was returned the list of delinquent taxes which I had sent

in my former letter. There has been no compliance, so far as I know, with the order made by the court requiring the proper officer of the government to "specify distinctly opposite each name on said list what part of said claim was rejected because of the negligence of said defendant Wishard to collect the same, and what part is rejected because said taxes were paid to the said defendant or his deputies before the expiration of his term of office.

And further this deponent saith not.

U. M. ROSE.

To the introduction and reading said letters to the court the United States objected, upon the ground that said letters were irrelevant and that they did not show any sufficient or proper application to the department by the defendants to be allowed credit for the tax-lists turned over by the defendant Wishard to his successor in office, Fick, which objection was overruled, and said letters were introduced and read to the court, to which ruling of the court the United States, by her attorney, at the time excepted.

And be it further remembered that said defendants, having introduced and read to the court the letters hereinbefore set out at length in this bill of exceptions, then offered to introduce and read in evidence to the jury the receipt—admitted to be genuine—of H. W. Fick, the successor in the office of collector of internal revenue of said Wishard, for certain property and lists of uncollected taxes turned over to said Fick, as collector, by said Wishard, and also offered to introduce and read in evidence to the jury the lists of uncollected taxes mentioned in and part of said receipt, and which receipt and list of taxes are in the words and figures following, to wit:

Receipt.

Received, Dardanelle, Arkansas, this July 31st, 1871, of R. W. Wishard, collector 3rd district of Arkansas, the following books, blanks, official letters, schedule of outstanding taxes, abatement claims, and office property belonging to the collector's office of the 3rd district of Arkansas, viz: 100 blanks, form 108; 275 blanks, form 102; 50 blanks B, form 48; 40 blanks A, form 48; 68 blanks B, form 48 1-2; 100 blanks, form 23; 76 blanks, form 138; 12 blanks, form 22; 88 blanks, form 128; 80 blanks, form 76; 60 blanks, form 85; 149 blanks, cigar affidavits, form 8; 52 blanks, form 8; 10 blanks, form 93; 70 blanks, form 103; 129 blanks, form 56; 60 blanks, form 23 1-2; 62 blanks A, form 93; 77 blanks, form 117; 500 blanks, form 81; 100 blanks, form 9; 101 blanks, form 49; 75 blanks, form 17; 60 blanks, form 21; 29 blanks, form 63; 200 blanks, form 21; 25 blanks, form 2; 99 blanks, form 18; 130 blanks, form 120; 60 blanks, form 44; 50 blanks, form 53; 151 blanks, form 43; 50 blanks, form 79; 100 blanks, form 51; 50 blanks, form 33; 10 blanks, form 47; 20 blanks, form 135; 10 blanks, form 7; 113 blanks, form 96; 10 blanks, form 30; 48 blanks, form 69; 60 blanks, form 61; 23 blanks, form 1; 60 blanks A, form 60; 25 blanks B, form 60; 109 blanks, form 99; 39 blanks, form 71; 24 blanks, form 29; 25 blanks, form 118; 35 blanks, form 46; 40 blanks, form 105; 72 blanks, form 91; 50 blanks, form 59; 10 blanks, form 16; 32 blanks, form R. S. T.; 40 blanks, form 41; 10 blanks, form 137; 52 blanks, form 117; 46 blanks, form 36; 78 blanks, form 70; 200 blanks, form 19; 52 blanks, form 58; 20 blanks, form 47; 60 blanks, form 38; 25 blanks, form 30; 49 blanks, form 47; 29 blanks, form 80; 25 blanks, form 63; 8 books, form 5; 1 book, record for abatements; 1 book, record for taxes abated; 2 books, collector's

daily receipts; 2 books, dep'ty collector's receipts; 1 book, seizure and sales; 1 book, form 1; 5 books, assessments, form 23; 1 book, daily receipts; 1 book, form 49; 2 books, form 51; 1 book, form 56; 1 book, form 44; 2 books, form 93; 1 book, record tobacco and snuff;
13 1 book, tickler, form 51; 1 book, collections and deposits; 1 book, record of cigars; 2 books, form 103; 1 book, register of collectors and assessors; 1 book, record of instruments, stampers; 1 book, assessments, collections, and abatements; 1 book, form 90; 1 book, pay and allowances, form 56; 1 book, permit to manufacture cigars; 1 book, records; 1 letter-press book and brush; 1 office; 1 book, table of salaries; 400 blanks, form 23; 2,500 legal size envelopes, coll.; 1,700 legal size envelopes, dep'ty coll.; 500 letter size envelopes, dep'ty coll.; 500 letter size envelopes, coll.; 210 ass't'd size envelopes; 1 rea n 1-2-sheet letter paper; 1 ream double-sheet letter paper; 1 list of outstanding taxes—$18,318.34; 1 list of claims for abatement—559.61.

H. W. FICK,
Coll. 3rd Dist. Arks.

Alphabetical list of persons in division No. of collection district No. of the of , liable to a tax under the internal revenue laws of the United States, and the amount thereof, as assessed by , assistant assessor, and by , assessor, returned to the collector of said district for the month of , 187 .

Assessors must be particular to fill all the blanks in this form, as far as practicable, and to number all articles and occupations upon which taxes are assessed to correspond with the entry in the abstract.

	No. of line.	Name.	Location & post-office address.	Article or occupation.	No. in abstract.	Quantity or valuation.	Rate of tax.	Amount of tax upon particular article.	Total.	Date of payment.	Amount of tax paid.	Amount of unassessed penalties paid.	Date when claims for abatement are forwarded.	No. of abatement order.	Amount abated.	No. of line.
June 69	1	Gellum, Albert	Richmond	Deal. ret. liq	14	12 mo	25		25							1
	2	Sanders, J. C	Arkadelphia	" "	95	" "	10		10							2
Aug.	3	"	"	" mf. tob	34	" "	5		5							3
"	4	Smith, H. W	Fort Smith	" ret	95	10 "	10		8 33							4
	5	"	"	" mf'd tob	34	" "	5		4 17							5
July 6	6	B rry & Ellensberg	Rally Hill	" ret. liq., raised	14	11 "	25		13 75							6
	7	Baker, A. B	Carrolton	Physician	128	12 "	10		10							7
	8	Brackwell & Bro	Fayettville	Deal mf'd tob	34	" "	5		5							8
	9	Dinsmore, A. W	"	Income	132	$17.33	5		86 65							9
	10	Mullins & Bro	"	Plug tob	29	58	32		18 56							10
	11	Mellum, B	Lead Hill	Deal. ret	95	12 mo	10		10							11
	12	Nolen, W. L	Fayetteville	" " liq	14	10 "	25		50 83							12
	13	Thomas, W. B	Bloomfield	Photograph	126	12 "	10		10							13
	14	Dibrell, J	Van Buren	Physician	128	" "	"		10							14
	15	Fleeman, M. F	South Ozark	Ferry receipt	51	$174.00	2 p.ct		4 35							15
	16	Foster, Thos. M	Colliersville	Hotel-keeper	104	10 mo	10		8 33							16
	17	Linley, Patten & McLain	Marshall Prairie	Deal. ret	95	12 "	10		10							17
	18	Seals, R. D	Van Buren	Dentist	97	" "	"		10							18
	19	Thompon, Maj	Clarksville	Stallion	130	" "	"		10							19
	20	Ward, Jas. H	"	Physi ian	128	" "	"		10							20
	21	Moore, G. W	Dardanelle	Deal. ret. liq	14	" "	25		25							21
	22	Pasham, J. M	Petit Jean	Physician	128	" "	10		10							22
	23	Mendish, H. H	Milton	Manufact'er	115	" "	"		10							23
Aug.	24	Barn, R. W	Sugar Loaf	Physician	128	" "	"		10							24
	25	Edward, Eufer	Fort Smith	Ret. deal	95	9 "	"		7							25
	26	Hind, Edward	" "	Deal. ret. liq	14	12 "	25		25							26
	27	" "	" "	" mf'd tob	34	" "	5		5							27
	28	Hare, Jno	" "	Hotel	104	" "	10		10							28
	29	Harden & Harden	" "	Deal. ret. liq	14	9 "	25		18 75							29
	30	" "	" "	" mf'd tob	34	" "	5		3 75							30

31	Johnson, N. C	Waldron	" retail	95	" "	10		7 50							31
32	Montgomery, Jackson	Fort Smith	Hotel keeper	104	12 "	"		10							32
33	Leonard, M W	Greenwood	Lawyer	112	" "	"		10							33
24	Mathews, W. A	F't Smith	Dentist	67	" "	"		10							34
35	Miller, N. V	Milton P O	Lawyer	112	" "	"		10							35
36	Neis, Auther	F't Smith	Butcher	89	9 "	"		7 50							36
37	Priest, Jno	Waldron	Deal. ref. liq	14	" "	25		18 75							37
38	Schmidt & Co	F't Smith	" " "	"	" "	"		28 75							38
39	" "	" "	" mf'd tob	34	" "	5		3 75							39
40															40
								512 72							

15 There are forty-two pages more of like import, the taxes on which aggregate the amount specified in the receipt given by F. W. Fick to the defendant R. W. Wishard, viz, $18,318.34, which additional lists are omitted by agreement of counsel of both parties.

16 To the introduction in evidence of said receipt and said list of taxes hereinbefore set out the United States by her attorney at the time objected upon the grounds that no proper claim for credits or allowance of said tax lists turned over by Wishard to Fick, his successor in office, had been made to the proper department, and because the defendants could not be allowed credit for said lists so turned over until it had been proved to the satisfaction of the Commissioner of Internal Revenue and he had certified the facts to the First Comptroller of the Treasury that due diligence was used by Wishard to collect such taxes, and that no other evidence of diligence could be received, which objections were overruled by the court, and said receipt and said lists of taxes were permitted to be read, and were read in evidence; to which ruling of the court the United States by her attorney at the time excepted.

And be it further remembered that said defendants to maintain the issue on their part offered to read in evidence the depositions of William H. Feltus, William P. Field, taken on the part of said defendants, and which tended to prove that Wishard as collector had used due and proper diligence to collect the taxes embraced in the tax lists by him turned over to Fick, his successor in office, to the reading of which depositions the United States by her attorney at the time objected because the facts which said depositions tended to prove were irrelevant, and because said claim for a credit for said tax lists had never been properly presented for allowance to the proper department, and because no proof of diligence on the part of said Wishard to collect said taxes embraced in said lists could be received by the court until it is first shown that it has been proved to the satisfaction of the Commissioner of Internal Revenue, and that officer has certified the facts to the First Comptroller of the Treasury, that due diligence was used by said Wishard as collector to collect said taxes, which objections were by the court overruled, and said depositions were read to the jury; to which ruling of the court the United States by her attorney at the time excepted, and the United States by her attorney prayed that this, her bill of exceptions to the said several rulings of the court so excepted to might be allowed, which is accordingly done, and this her first bill of exceptions ordered to be made part of the record in this case.

November 3, 1876.

HENRY C. CALDWELL,
Judge of U. S. for Eastern Dist. of Arks.

And on November 4, 1876, as follows:

Comes the United States, by Charles C. Waters, esq., district attorney, and dismisses this suit as to Henry C. Cunningham, administrator of Robert Cunningham, and come the defendants, by U. M. Rose, esq., their attorney, and come the jury, to wit, J. A. B. Bingham, W. H. Blackwell, W. C. Knight, W. D. Leiper, A. D. Meeks, Wiley B. Stuart, Wm. Sandlin, Albert P. Boon, J. J. Gillis, Ernest Jennings, John Kirkwood, and Wm. P. Davison, and the trial hereof not being concluded on yesterday the same is now resumed, and the jury having heard all the evidence and argument of counsel, and being charged and instructed by the court retired to consult of their vertict, and afterwards returned into court the following verdict: We, the jury, find the issues for the defendants.

It is therefore ordered that said plaintiff take nothing by her said complaint; and comes the United States, by Charles C. Waters, esq., district attorney, and files herein her second bill of exceptions to the
17 rulings of the court, which is signed by the court.

Which second bill of exceptions is in the words and figures following, to wit:

Be it remembered that on the trial of this cause the court, on its own motion, instructed the jury in chief as follows:

"This suit is brought by the United States to recover from the defendants the sum of $17,352.25 claimed to be due from R. W. Wishard, late collector of internal revenue. To sup'ort the issue on the part of the United States the district attorney has laid before you a certified account from the books of the Treasury Department showing a balance due from the defendants amounting to the sum of $17,352.25. This account is authenticated in the mode provided by the act of Congress, and is prima facie evidence of the facts therein certified. In other words, it is competent evidence, and taken by itself is sufficient evidence to authorize and require you to find a verdict for the United States for the amount therein certified to be due to the United States. But such certified account is not conclusive evidence of the state of the accounts between the United States and Wishard, and the defendants having made an application to the proper department to be allowed credit for the amount of certain lists of uncollected taxes turned over by Wishard to Fick, his successor in office, and the department having, for reasons set forth in the letters relating to the subject, refused to credit Wishard's account with the amount of such tax lists so turned over, the defendants have a right to make a claim for said alleged credit in this court, and if under the law and the evidence they are entitled to such credit it should be allowed. The total amount of the lists of uncollected taxes which Wishard turned over to Fick, his successor in office, was $18,877.95. When Fick was appointed to succeed Wishard in the office of collector it was the duty of Wishard to turn over to his successor in office all lists of uncollected taxes remaining in his hands, and it appears from the evidence, and is not disputed, that he did so; but the fact that such lists were turned over by Wishard to Fick, his successor in office, is not of itself sufficient to discharge Wishard from liability for the taxes embraced in said lists. If any of the taxes embraced in said lists had in fact been collected by Wishard or his deputies before said lists were turned over to Fick, the defendants are of course answerable for such taxes. The United States has offered evidence on this point, and you will of course deduct from the amount of the lists of uncollected taxes turned over by Wishard to Fick whatever taxes are shown to have been paid before said lists were turned over. And as to the other taxes appearing on said lists so turned over, proof that said lists of taxes were turned over to Fick, the successor of Wishard, is not in itself sufficient to discharge the defendants from liability therefor, but they must also satisfy you that Wishard used diligence in his office of collector to collect said taxes, or in other words, that said taxes could not, with the exercise of diligence on the part of Wishard and his deputies, be collected. For the taxes embraced in said lists so turned over which had not in fact been paid to Wishard and his deputies, and which he had in good faith made a diligent effort to collect and been unable to
18 do so, the defendants are entitled to credit. The burden of proof is on the defendants to satisfy you not only that Wishard turned over said lists to his successor, but that he had used diligence to collect

the taxes embraced in said lists before the same were turned over. You are the sole judges of the facts of the case and of the credibility of the witnessess and the weight to be given to the evidence of each.

"And be it remembered further that the United States by her attorney at the time said charge was delivered to the jury excepted to the following portion thereof, that is to say: "The defendant having made an application to the proper department to be allowed credit for the amount of certain lists of uncollected taxes turned over by Wishard to Fick, his successor in office, and the department having for reasons set forth in the letters relating to the subject refused to credit Wishard's account with the amount of such tax lists so turned over, the defendants have a right to make a claim for said alleged credits in this court, and if under the law and the evidence they are entitled to such credits it should be allowed."

The United States by her attorney excepted to the giving of said instruction because there was no evidence to show that said claim for a credit for taxes on the lists turned over by Wishard to Fick had been properly presented to and disallowed by the proper department, but the *the* court gave said instruction to the jury, to the giving of which instruction the United States by her attorney at the time excepted.

And be it further remember that on the trial of this cause the United States by her attorney prayed the court to charge the jury as follows:

"Comes Charles C. Waters, district attorney, and on behalf of the plaintiff moves the court to instruct the jury as follows:

"1. That the receipt offered in evidence by defendants of H. W. Fick, collector, to Robert W. Wishard, ex-collector, can properly have no weight with the jury as evidence, unless accompanied by the certificate of the Commissioner of Internal Revenue or the First Comptroller of the Treasury that due diligence was used by the collector, and as no such certificate has been offered in the case at bar the receipt should be disregarded by the jury."

(Refused.)

"2. That the papers offered by the defendant, marked Exhibit B, purporting to be copy of lists transferred by Collector Wishard to his successor, Fick, which papers taken in connection with the letters of H. C. Rogers, deputy commissioner of internal revenue, of date October 6th, 1875, and October 20th, 1875, marked Exhibits J and L, are alleged by defendant's counsel to constitute a disallowed claim by the Commissioner of Internal Revenue, do not constitute a disallowed claim within the meaning of the statutes upon that subject, and the rulings and regulations of the Treasury Department and the Commissioner of Internal Revenue in pursuance thereof; that an inspection of the letters of the deputy commissioner, just referred to, shows that the purported claim was not acted upon and disallowed, but that the Commissioner refused to entertain or act upon the said papers at all. That the presentation of these papers in this form, showing merely the transferred lists in gross, and demanding that the Commissioner shall set opposite each name and amount embraced therein the reason why such amount is still charged to the collector, is not a regular presentation of a claim by the collector for abatement within the statutes and regulations of the Treasury Department and the Commissioner of Internal Revenue, and the
19 papers so presented here not forming such a disallowed claim can properly have no weight with the jury as against the prima facie case made out by the Treasury transcript.

Which said instructions were refused by the court; to which refusal the United States by her attorney at the time excepted. And the United

States by her attorney at the time moved the court to allow and sign this her second bill of exceptions to the said rulings of the court; which is now here acordingly done.

HENRY C. CALDWELL,
Judge U. S. for East. Dist. Arks.

NOVEMBER 4, 1876.

And on December 22, 1876, as follows:

Comes the United States, by P. C. Dooley, esq., acting district attorney, and files herein her citation and also writ of error, which is signed by the court.

Which citation is as follows:

20 By the honorable Henry C. Caldwell, one of the judges of the circuit court of the United States for the eastern district of Arkansas, in the 8th circuit.

To G. L. Kimball, administrator of Robert W. Wishard, deceased, et al., or to U. M. Rose, esq., their attorney of record:

Whereas lately issued out of the circuit court of the United States a writ of error, directed to the judge of the circuit court of the United States for the eastern district of Arkansas, stating that in the record and proceedings, as also in the rendition of the judgment of a plea in the said court before the judges thereof, between the United States, plaintiff, and G. L. Kimball, adm. of Robt. W. Wishard, dec'd, et al., are defendants, a manifest error hath happened, to the great damage of the said plaintiff; and whereas, for the correction of that error in due manner the said writ has been issued, returnable at the next stated term of the Supreme Court of the United States, at the city of Washington, on the day of October next, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the said second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Little Rock, in the eastern district of Arkansas, in the 8th circuit, the fourteenth day of December, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundred & first.

HENRY C. CALDWELL,
U. S. Judge for East. Dist. Ark.

Service acknowledged Dec. 22, 1876.

U. M. ROSE,
For Defendants in Error.

Filed Dec. 22, '76.

RALPH S. GOODRICH,
Clerk.

21 UNITED STATES OF AMERICA.
Eastern District of Arkansas:

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the originals on file and remaining of record in my office & such portions of others as therein stated.

In testimony whereof I have hereunto set my hand and the seal of

this court this 12th day of February, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the one hundred and first.

Attested:

[SEAL.] RALPH L. GOODRICH,
Clerk.

(Indorsement on cover:) No. 131. The United States, plaintiff in error, vs. G. L. Kimball, adm'r of Robt. W. Wishard, dec'd. E. Arkansas C. C. U. S. Filed 10th April, 1877.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

UNITED STATES
v.
G. L. KIMBALL. } No. 131.

ERROR TO UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

UNITED STATES
v.
G. L. KIMBALL. } No. 131.

ERROR TO UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Complaint upon the bond of late Robert W. Wishard, of whose estate Mr. Kimball is administrator, alleging that Mr. Wishard held and owed the sum of $21,846.40 to the United States for stamps, property, and money by him received as collector of internal revenue for the third district of Arkansas. (Record 3.)

Two bills of exception to the proceedings had upon the trial of this cause appear in the record. The first is, in substance, as follows:

Be it remembered, that on the trial of this cause on this day, the defendants, for the purpose of laying a foundation for the introduction of evidence to support his

claim for credits, introduced and read to the court a correspondence, admitted to be genuine, had by said Wishard and his attorneys with the Commissioner and Deputy Commissioner of Internal Revenue at Washington, D. C., which said correspondence was in the words and figures following, to wit:

DARDANELLE, ARKANSAS, *June* 1, 1874.

SIR: Yours, of April 30th, enclosing supplemental report No. 8916, is now before me. I am at a loss to understand how you have made my aggregate liability to the government as late coll. int. rev. of 3rd dist. Ark. amount to the sum of $31,184.85, unless you have charged me with the June list of 1871. This list, I am under the impression, I never received nor receipted for, and therefore should not be charged with it. The report is further incorrect in this, that it does not allow me credit for the list of outstanding taxes turned over to and receipted for by my successor in office, H. M. Fick, as required by law, said receipt being dated July 31, 1871, and for the sum of $18,318.34, and list of taxes then claimed uncollectable and for which an abatement was then claimed, $559.61; total, $18,877.95. I now have in my possession one of the receipts given by Coll. Fick for the above lists, the other having been forwarded with my accounts.

Before allowing this matter to go to suit, I have to request that I be allowed the credits above claimed, and, if not allowed, I have to solicit the favor of a copy of the reports on file in your office upon which account No. 8916 is based, and I also desire to be advised whether or not I stand charged with the June list, 1871. But that will appear in the reports if copy is sent. Please advise me fully before any further steps are taken in this matter.

Very respectfully, your ob't serv't,
(Signed) R. W. WISHARD,
By THOMAS BOLES, *Att'y.*

This is Exhibit E to the deposition of U. M. Rose.
FAY HEMPSTEAD, *Commissioner.*

DARDANELLE, ARKANSAS, *July 10th*, 1874.

SIR: Your favor of 1st inst., enclosing summary statement of the account of late Coll. Wishard, is now before me. This being the first notice Mr. Wishard has had of the ruling of the honorable Commissioner of Internal Revenue refusing credit in the settlement of his accounts, the amount of the uncollected taxes embraced in the lists turned over by him to his successor in office, H. W. Fick, and receipted for by him, Fick, as such collector, on the 31st day of July, 1871, for the sum of $18,877.95, under the provisions of section 34, act of Congress approved Feb. 15th, and receipted for by said Collector Fick. This ruling Mr. Wishard deems unjust, and therefore respectfully excepts to the ruling of the Hon. Com'r in disregarding a receipt of Mr. Wishard's successor; and charging that amount to him to the relief of Mr. Fick upon the *ex parte* showing of Mr. Fick is certainly a little extraordinary; especially is this the case when it is remembered Mr. Wishard had no notice of this action of the department until long after this unfair adjustment was made. I have to respectfully request a copy of the report made by Coll. Fick to your office, by which he satisfies your office on an *ex parte* showing that he, Fick, has not collected the $11,318.20 which the same report satisfies your office that Coll. Wishard or his deputies had collected prior to the transfer of said uncollected lists by Wishard to Fick. The report, we hope, will show the names of the parties whom Mr. Fick claims have paid their taxes to Mr. Wishard prior to the lists being turned over to Mr. Fick, together with their post-office address and the respective amounts paid by each of them. I further desire a copy of the showing presented to department by Mr. Fick by which Mr. Wishard is charged with $451.44 on the June and July lists. Mr. Wishard insists that his stamp accounts were fully and finally closed out and settled up some time ago, and that he is able to show that; a fact well-known to Hon. Arthur Gunther, special supervisor int. rev., and Gen. John A. McDonald, supervisor, &c., both

St. Louis, Mo., also Hon. Wm. A. Britton, late U. S. marshal western district, Arkansas, F't Smith, Arkansas. An early reply is earnestly solicited.

Very respectfully, your ob't servant,
(Signed.) THOMAS BOLES.

Hon. J. W. DOUGLASS, *Com. Int. Rev.*

STATE OF ARKANSAS,
County of Yell:

I, Thomas Boles, do solemnly swear that the above and foregoing letters (the date of the law referred to not being legible) are true and perfect copies of letters sent by me to Hon. Com'r Int. Rev. on the subject therein treated of; that I have once since written the department for a statement of the names of the persons which Coll. Fick reported as having paid their taxes to Mr. Wishard before the transfer of the lists mentioned to Mr. Fick, but have no reply from the department.

THOMAS BOLES.

Sworn to and subscribed before me this 28th day of October, 1874.

GEORGE B. GUEST, *J. P.*

This is Exhibit F to the deposition of U. M. Rose.

FAY HEMPSTEAD,
Commissioner.

E. T. H. C. R. TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, July 1, 1874.

SIR: Your letters of the 1st & 19th ult., relative to the balance due to the U. S. from the late Collector R. W. Wishard, 3rd dist. Ark., were duly received, but prompt reply prevented by the pressure of business. I enclose herewith a summary statement of the account of late Collector Wishard as appears upon the books of this office, showing an aggregate balance due from him to the U. S. of $17,551.77. The balance due to the U. S. as shown in the last adjustment of his account by the

accounting officer of the department, No. 8916, is $21,846.40. The difference between these two amounts consists of certain items of credit not yet allowed by the accounting officers, but which will be considered in the final adjustment. Mr. Wishard did not receive credit for the amount of taxes reported by him as uncollected at the close of his term of office, for the reason that this office had reason to believe that portions of these taxes had in fact been collected by Mr. Wishard or his deputies prior to their transfer to his successor, Collector Fick. The amount reported by Mr. Wishard as uncollected at the close of his term is $18,877.95. This is accounted for as follows:

Amount collected by Coll. Fick to May 31st.	$1,702 11
Amount abated by orders No. 6167 & 7165..	5,059 06
Amount paid to Mr. Wishard or his deputies, prior to the transfer, as reported to this office by Coll. Fick.....	11,318 20
Balance to be accounted for	798 58
Total	18,877 95

The statement herewith shows that Mr. Wishard is charged with the lists receipted for by him only, the latest being the list for May, 1871. The June list was receipted for by Collector Fick. Mr. Wishard is, however, charged with the taxes collected by him in the June and July, 1871, lists, as reported by Coll. Fick, amounting to $451.42.

Respectfully,

J. W. DOUGLASS,
Commissioner.

THOMAS BOLES, Esq.,
Att'y, &c., Dardanelle, Ark.

S. H. G.

This is Exhibit G. to the deposition of U. M. Rose.

FAY HEMPSTEAD,
Commissioner.

DARDANELLE, ARK., *Feb'y* 9, 1875.

SIR: Suit having been instituted against me and my sureties in the United States circuit court for the eastern district of Arkansas, for moneys alleged to be due from me as late collector of internal revenue of the third district of Arkansas, I now enclose to you a copy of my receipt from H. W. Fick, my successor in office, which I maintain to be a credit for the sums and property therein mentioned against the demands made in the said suit, and I now submit the same to you for examination and approval or disallowance, with a view to introducing the same in evidence on the trial of said cause.

Your early attention and reply will oblige,

Yours, truly,

R. W. WISHARD,
Late Coll. 3d Dist. Ark.

TREASURER OF THE UNITED STATES,
Washington, D. C.

This is Exhibit C to the deposition of U. M. Rose.

FAY HEMPSTEAD,
Commissioner.

(Indorsed:)

The original of which this is a true copy, together with the receipt, was mailed by R. W. Wishard to the Treasurer of the U. S., Washington, D. C., in my presence, on the 9th day of Feb'y, 1875, in the post-office at Dardanelle, Arkansas, at half past one o'clock p. m. of said day.

JNO. C. AUSTIN.

E. T. H. C. R. TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Feb. 22, 1875.

SIR: Referring to your letter of the 9 inst., relative to credit claimed to be due you on account of taxes transferred as uncollected to your successor in office, you are advised that the condition of your office and lists at the expiration of your term of office was such

that this office did not feel warranted in certifying that you had exercised due diligence to collect the taxes transferred as above stated. This course has been fully justified by the result of the examination of the taxes in question; as it has been ascertained that $11,318.20 of the said taxes were collected by you or your deputies prior to the expiration of your term of office. Collector Fick can, if called upon, substantiate the statement made herein. As respects the blank forms, stationery, &c., alleged to have been transferred to Collector Fick, you are advised that the balance due from you does not include any amounts on account of stationery, blank books, &c., so that you have not been prejudiced in any way because of the same.

Respectfully,

J. W. DOUGLASS,
Commissioner.

R. W. WISHARD, Esq.,
Late Coll. 3 Dist., Dardanelle, Arkansas.

This is Exhibit D to the deposition of U. M. Rose.

FAY HEMPSTEAD,
Commissioner.

[Copy.]

LITTLE ROCK, *Sept. 27th*, 1875.

DEAR SIR: Enclosed I send you a list of taxes uncollected by Robert W. Wishard, deceased, late collector of internal revenue, and which list was turned over by him at the end of his term of office to H. W. Fick, his successor, for which credit is claimed on the suit brought against said Wishard and his sureties, and now pending in the U. S. circuit court for the eastern district of Arkansas, and which is now here submitted for allowance or disallowance. You will please return the same to my attorney, U. M. Rose, esq., at Little Rock, Arkansas, after having specified distinctly, opposite each name on said list, what part of said claim is rejected because of the negligence of said Wishard to collect the same, and

what part of said taxes was paid to said Wishard or his deputies before the expiration of his term of office.

Very respectfully,

(Signed.) G. W. KIMBALL,
Executor, &c.
By U. M. ROSE, *Att'y.*

COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

This is Exhibit H to the deposition of U. M. Rose.
FAY HEMPSTEAD,
Commissioner.

E. T.

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, Oct. 6, 1875.

SIR: Referring to your letter of the 27th ult., relative to the taxes transferred by the late R. W. Wishard, late coll. 3rd dist. Arkansas, to his successor, you are advised that the list referred to as enclosed in your letter has not been received. It will be returned to you, however, when received.

The refusal of this office to make the certificate of diligence necessary to ensure the charging of the taxes referred to by you to the successor of late Coll. Wishard was general rather than special in its nature. The fact that a large part of the amount covered by the transfer list was collected prior to the date of transfer is established by receipts and other evidence on file in the office of the collector of internal revenue.

The United States attorney is in possession of the facts in the case, and you are referred to him for any further information you desire on the subject.

Respectfully,

H. C. ROGERS,
Deputy Commissioner.

U. M. ROSE, Esq.,
Little Rock, Arkansas.

This is Exhibit J to the deposition of U. M. Rose.
FAY HEMPSTEAD,
Commissioner.

[Copy.]

LITTLE ROCK, *October 11th*, 1875.

DEAR SIR: Yours of the 6th, "E. T.," received, in which you say "you are advised that the list referred to as enclosed in your letter has not been received." I think that there has been some oversight in your office on this subject, for the letter and the list were made up into a long roll of very considerable size, and were securely enclosed in a substantial wrapper and put in the mail, so that the letter and the list must have been received at the same time.

Very respectfully,

U. M. ROSE.

COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

This is Exhibit K to the deposition of U. M. Rose.
FAY HEMPSTEAD,
Commissioner.

E. T.

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, Oct. 20, 1875.

SIR: Referring to your letter of the 11th inst., relative to a list of taxes alleged to have been transferred by R. W. Wishard, late coll. 3rd dist. Arkansas, to his successor in office, you are hereby advised that the list in question has been found, and will be sent by the mail of to-day to you, at Little Rock.

Respectfully,

H. C. ROGERS,
Deputy Commissioner.

U. M. ROSE, Esq'r,
Little Rock, Arkansas.

This is exhibit L to the deposition of U. M. Rose.
FAY HEMPSTEAD,
Commissioner

For the same purpose the defendants read to the court the deposition of a witness, U. M. Rose, in words and figures as follows, to wit:

I am attorney for the defendants in this suit. This case was formerly submitted to a jury, and after the evidence was heard the court, on its own motion, discharged the jury and continued the cause, in order that the United States Government might make its demands more definite. On that trial the defendant, R. W. Wishard, was examined as a witness on the part of the defense, and was cross-examined by the district attorney. He sated on the trial, on his examination, that on the 9th day of February, A. D. 1875, he mailed to the Treasurer of the United States, at Dardanelle, Ark., a letter, of which he referred to Exhibit C, hereto annexed, as a true copy; and that he received in due course of mail a letter, signed by the Commissioner of Internal Revenue, dated Feb. 22nd, 1875, hereto annexed, marked Exhibit D. He stated also that he enclosed in his letter of Feb. 9th a copy of the receipt given by Fick, as internal revenue collector, and which is referred to in the deposition of W. H. Feltus, above given. (See said receipt, on page 12.) He also testified to the mailing of a letter, dated June 1st, 1874, and another dated July 10th, 1874, hereto annexed, marked Exhibits E and F, and also to the receipt of a letter from the Commissioner, dated July 1st, 1874, hereto annexed, and marked Exhibit G.

In the same testimony Mr. Wishard stated that he had used the utmost diligence in collecting such taxes as were turned over on the list to Fick, and that the taxes mentioned in said list were wholly unpaid. Said Wishard has since died. On the 27th day of September, 1875, I mailed to the Commissioner of Internal Revenue a letter, hereto annexed, and marked Exhibit H, enclosing with the letter the list of delinquent taxes, mentioned in the testimony of William P. Field, herein. In reply I received a letter from the Commissioner or his deputy, dated Oct. 6th, 1875, saying that the letter had been received, but not the list. I hereto attach his letter, marked Exhibit J. This letter was received in due course of mail.

I at once wrote him—Oct. 11th, 1875—saying that the list was enclosed with the letter, and that they must have both been received by him at the same time, a copy of which letter is hereto annexed, marked Exhibit K, and made a part hereof. In reply to this, I received by due course of mail a letter from the deputy commissioner, dated October 20th, 1875, which is hereto annexed and marked Exhibit L. With this letter was returned the list of delinquent taxes which I had sent in my former letter. There has been no compliance, so far as I know, with the order made by the court requiring the proper officer of the government to "specify distinctly, opposite each name on said list, what part of said was rejected because of the negligence of said defendant Wishard to collect the same, and what part is rejected because said taxes were paid to the said defendant or his deputies before the expiration of his term of office."

And further this deponent saith not.

U. M. ROSE.

To the introduction and reading said letters to the court the United States objected, upon the ground that said letters were irrelevant, and that they did not show any sufficient or proper application to the department by the defendants to be allowed credit for the tax-lists turned over by the defendant Wishard to his successor in office, Fick, which objection was overruled, and said letters were introduced and read to the court; to which ruling of the court the United States, by her attorney, at the time excepted.

And be it further remembered that said defendants, having introduced and read to the court the letters herein-before set out at length in this bill of exceptions, then offered to introduce and read in evidence to the jury the receipt, admitted to be genuine, of H. W. Fick, the successor in the office of collector of internal revenue of said Wishard, for certain property and lists of uncollected taxes turned over to said Fick, as collector, by said Wishard, and also offered to introduce and read

in evidence to the jury the lists of uncollected taxes mentioned in and part of said receipt, and which receipt and list of taxes are recited in the record, pp. 12 to 16, top.

To the introduction in evidence of said receipt and said list of taxes, hereinbefore set out, the United States, by her attorney, at the time objected, upon the grounds that no proper claim for credits or allowance of said tax-lists turned over by Wishard to Fick, his successor in office, had been made to the proper department, and because the defendants could not be allowed credit for said lists so turned over until it had been proved to the satisfaction of the Commissioner of Internal Revenue, and he had certified the facts to the First Comptroller of the Treasury, that due diligence was used by Wishard to collect such taxes, and that no other evidence of diligence could be received; which objections were overruled by the court, and said receipt and said lists of taxes were permitted to be read, and were read in evidence; to which ruling of the court the United States, by her attorney, at the time excepted.

And be it further remembered that said defendants, to maintain the issue on their part, offered to read in evidence the depositions of William H. Feltus, William P. Field, taken on the part of said defendants, and which tended to prove that Wishard, as collector, had used due and proper diligence to collect the taxes embraced in the tax-lists by him turned over to Fick, his successor in office; to the reading of which depositions the United States, by her attorney, at the time objected, because the facts which said depositions tended to prove were irrelevant, and because said claim for a credit for said tax-lists had never been properly presented for allowance to the proper department, and because no proof of diligence on the part of said Wishard to collect said taxes embraced in said lists could be received by the court until it is first shown that it has been proved to the satisfaction of the Commissioner of Internal Revenue, and that officer has certified the facts to the First Comptroller of the Treasury, that due diligence was used by said Wishard, as collector, to collect said taxes; which objec-

tions were by the court overruled and said depositions were read to the jury; to which ruling of the court the United States, by her attorney, at the time excepted; and the United States, by her attorney, prayed that this, her bill of exceptions to the said several rulings of the court so excepted to, might be allowed, which is accordingly done, and this, her first bill of exceptions, ordered to be made part of the record in this case.

The second bill of exceptions is in the words and figures following, to wit:

Be it remembered that on the trial of this cause the court, on its own motion, instructed the jury in chief as follows:

This suit is brought by the United States to recover from the defendants the sum of $17,352.25, claimed to be due from R. W. Wishard, late collector of internal revenue. To sup'ort the issue on the part of the United States the district attorney has laid before you a certified account from the books of the Treasury Department, showing a balance due from the defendants amounting to the sum of $17,352.25. This account is authenticated in the mode provided by the act of Congress, and is *prima-facie* evidence of the facts therein certified. In other words, it is competent evidence, and taken by itself is sufficient evidence to authorize and require you to find a verdict for the United States for the amount therein certified to be due to the United States.

But such certified account is not conclusive evidence of the state of the accounts between the United States and Wishard, and the defendants having made an application to the proper department to be allowed credit for the amount of certain lists of uncollected taxes turned over by Wishard to Fick, his successor in office, and the department having, for reasons set forth in the letters relating to the subject, refused to credit Wishard's account with the amount of such tax lists so turned over, the defendants have a right to make a claim for said alleged credit in this court, and if under the law and the

evidence they are entitled to such credit it should be allowed. The total amount of the lists of uncollected taxes which Wishard turned over to Fick, his successor in office, was $18,877.95.

When Fick was appointed to succeed Wishard in the office of collector, it was the duty of Wishard to turn over to his successor in office all lists of uncollected taxes remaining in his hands, and it appears from the evidence, and is not disputed, that he did so; but the fact that such lists were turned over by Wishard to Fick, his successor in office, is not of itself sufficient to discharge Wishard from liability for the taxes embraced in said lists. If any of the taxes embraced in said lists had in fact been collected by Wishard or his deputies before said lists were turned over to Fick, the defendants are of course answerable for such taxes.

The United States has offered evidence on this point, and you will of course deduct from the amount of the lists of uncollected taxes turned over by Wishard to Fick whatever taxes are shown to have been paid before said lists were turned over; and as to the other taxes appearing on said lists so turned over, proof that said lists of taxes were turned over to Fick, the successor of Wishard, is not in itself sufficient to discharge the defendants from liability therefor, but they must also satisfy you that Wishard used diligence in his office of collector to collect said taxes, or, in other words, that said taxes could not, with the exercise of diligence on the part of Wishard and his deputies, be collected.

For the taxes embraced in said lists so turned over, which had not, in fact, been paid to Wishard and his deputies, and which he had in good faith made a diligent effort to collect, and been unable to do so, the defendants are entitled to credit. The burden of proof is on the defendants to satisfy you not only that Wishard turned over said lists to his successor, but that he had used diligence to collect the taxes embraced in said lists before the same were turned over. You are the sole judges of the facts of the case, and of the credibility of the witnesses, and the weight to be given to the evidence of each.

And be it remembered further that the United States, by her attorney, at the time said charge was delivered to the jury, excepted to the following portion thereof, that is to say: "The defendant having made an application to the proper department to be allowed credit for the amount of certain lists of uncollected taxes turned over by Wishard to Fick, his successor in office, and the department having, for reasons set forth in the letters relating to the subject, refused to credit Wishard's account with the amount of such tax lists so turned over, the defendants have a right to make a claim for said alleged credits in this court, and if, under the law and the evidence, they are entitled to such credits, it should be allowed."

The United States, by her attorney, excepted to the giving of said instruction, because there was no evidence to show that said claim for a credit for taxes on the lists turned over by Wishard to Fick had been properly presented to and disallowed by the proper department, but the *the* court gave said instructions to the jury; to the giving of which instruction the United States, by her attorney, at the time excepted.

And be it further remember' that on the trial of this cause, the United States, by her attorney, prayed the court to charge the jury as follows:

"Comes Charles C. Waters, district attorney, and on behalf of the plaintiff moves the court to instruct the jury as follows:

"1. That the receipt offered in evidence by defendants of H. W. Fick, collector, to Robert W. Wishard, ex-collector, can properly have no weight with the jury as evidence, unless accompanied by the certificate of the Commissioner of Internal Revenue or the First Comptroller of the Treasury that due diligence was used by the collector; and as no such certificate has been offered in the case at bar, the receipt should be disregarded by the jury."

(Refused.)

"2. That the papers offered by the defendant, marked Exhibit B, purporting to be copy of lists transferred

by Collector Wishard to his successor, Fick, which papers, taken in connection with the letters of H. C. Rogers, Deputy Commissioner of Internal Revenue, of date October 6th, 1875, and October 20th, 1875, marked Exhibits J and L, are alleged by defendants' counsel to constitute a disallowed claim by the Commissioner of Internal Revenue, do not constitute a disallowed claim within the meaning of the statutes upon that subject, and the rulings and regulations of the Treasury Department and the Commissioner of Internal Revenue in pursuance thereof; that an inspection of the letters of the Deputy Commissioner, just referred to, shows that the purported claim was not acted upon and disallowed, but that Commissioner refused to entertain or act upon the said papers at all. That the presentation of these papers in this form, showing merely the transferred lists in gross, and demanding that the Commissioner shall set opposite each name and amount embraced therein the reason why such amount is still charged to the collector, is not a regular presentation of a claim by the collector for abatement within the statutes and regulations of the Treasury Department and the Commissioner of Internal Revenue, and the papers so presented here, not forming such a disallowed claim, can properly have no weight with the jury as against the prima facie case made out by the Treasury transcript."

Which said instructions were refused by the court; to which refusal the United States, by her attorney, at the time excepted.

And the United States, by her attorney, at the time moved the court to allow and sign this her second bill of exceptions to the said rulings of the court; which is now here accordingly done. (Record, 17–19.)

ASSIGNMENT OF ERROR.

1. The court erred in admitting the letters, list of taxes, and receipt hereinbefore mentioned and fully specified.

2. In admitting the depositions above mentioned to prove "due diligence" of Wishard.

3. In ruling, in the language above quoted, that the application for credits was such as to authorize the defendants to make claim therefor in this suit. (Record, 18, top.)

4. In refusing the specific requests of the United States attorney in the language in which they are above set out, and in omitting to give instructions of like effect.

over

BRIEF.

I

The general provisions of the act of March 3, 1797, c. 20, § 3 (1 Stats., 514; R. S., § 951), are limited and modified by the terms of the later act of July 13, 1866, c. 184, § 9 (14 Stats., 110; R. S., § 3218), under which this trial was had.

By this section Mr. Wishard was entitled to the credit claimed only in case he had satisfied the Commissioner of Internal Revenue that due diligence had been used by him. (R. S., sec. 3218.)

II.

The certificate of due diligence by the Commissioner of Internal Revenue was a *condition precedent* to the allowance of any credit upon the charge for the whole list of taxes committed.

III.

The claim for credits was never properly presented to the Commissioner of Internal Revenue nor to the accounting officers of the Treasury.

EDWIN B. SMITH,
Assistant Attorney-General.

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